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No. 06-157

IN THE

# Supreme Court of the United States

DENNIS GRACE, Acting Director of the White House Office of Faith-Based and Community Initiatives, *et al.*,
*Petitioners*,

v.

FREEDOM FROM RELIGION FOUNDATION, INC., *et al.*,
*Respondents*.

**On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit**

## BRIEF OF THE STATES OF INDIANA, ALABAMA, COLORADO, KANSAS, MICHIGAN, OHIO, OKLAHOMA, SOUTH CAROLINA, TEXAS, VIRGINIA, WASHINGTON, AND WYOMING AS *AMICI CURIAE* IN SUPPORT OF THE PETITION

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## QUESTION PRESENTED

Whether taxpayers have standing under Article III of the Constitution to challenge on Establishment Clause grounds the actions of Executive Branch officials pursuant to an Executive Order, where the plaintiffs challenge no Act of Congress, the Executive Branch actions at issue are financed only indirectly through general appropriations, and no funds are disbursed to any entities or individuals outside the government.

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## INTEREST OF *AMICI CURIAE*

State officials are frequently sued in federal court by state taxpayers seeking to enjoin various government actions on Establishment Clause grounds. And, as the Court confirmed just last term, state-taxpayer standing is coterminous with federal-taxpayer standing. *See DaimlerChrysler Corp. v. Cuno*, __ U.S. __, 126 S. Ct. 1854, 1863-64 (2006). Taxpayers generally do not have standing to challenge government programs in federal court because any injury to the taxpayer from misappropriation of funds from the treasury is too remote and too attenuated to meet the "direct injury" requirement of Article III. The history underlying adoption of the Establishment Clause, however, has led to an exception from this general rule when taxpayers bring Establishment Clause challenges to legislative spending. The decision below expanding the circumstances in which this exception applies affects the states as well as the federal government.

Maintaining proper limits on this exception is necessary in light of the Constitution's horizontal and vertical structural limits on the exercise of government power. Vigilance concerning Article III standing is required to avoid using "a federal court as a forum in which to air . . . generalized grievances about the conduct of government or the allocation of power in the Federal System." *See Flast v. Cohen*, 392 U.S. 83, 106 (1968). It is also necessary to prevent federal courts from becoming state fiscal monitors. *See DaimlerChrysler*, 126 S. Ct. at 1864. Accordingly, the *amici* states, like the Federal Government, have a strong interest in ensuring that federal courts are limited to their proper judicial role, as justified by the text, history, and structure of Article III and the First Amendment, in adjudicating Establishment Clause cases.

## REASONS FOR GRANTING THE PETITION

### I. Clarifying the Limits of Federal-Taxpayer-Standing Doctrine Will Aid Lower Courts with Establishment Clause Cases Against State Officials as Well

State-taxpayer-standing doctrine, like its federal-taxpayer counterpart, is a staple of Establishment Clause cases. And while some lower court decisions have treated state and federal taxpayers differently, the Court confirmed last term in *DaimlerChrysler Corp. v. Cuno*, __ U.S. __, 126 S. Ct. 1854 (2006), that they should be treated the same with respect to federal-court standing. The need is all the greater, therefore, for the Court to clarify the historical rationale for, and the contours of, taxpayer-standing doctrine in Establishment Clause cases.

1. The Court initially rejected the notion that individuals could have standing to sue either federal or state officials in federal court simply because they are taxpayers. In *Frothingham v. Mellon*, 262 U.S. 447, 487 (1923), the Court observed that the relation between a federal taxpayer and the federal treasury is too remote and too speculative to confer Article III standing. The Court rejected federal-taxpayer standing because allowing it would open the floodgates for taxpayers to challenge "every . . . appropriation act and statute whose administration requires the outlay of public money." *Id.* Relying on separation-of-powers doctrine, the Court observed that it has "no power per se to review the annul acts of Congress on the ground that they are unconstitutional" and that it may only consider such questions when there is "direct injury" that creates a justiciable issue. *Id.* at 488.

The Court first permitted federal-taxpayer standing in *Flast v. Cohen*, 392 U.S. 83, 103 (1968). In *Flast*, the Court held that a federal taxpayer has standing to challenge an act of Congress only when the taxpayer can demonstrate that

"the challenged enactment exceeds specific constitutional limitations imposed upon the exercise of the congressional taxing and spending power." *Id.* at 102-03.

The only relevant "specific constitutional limitation" on the spending power for these purposes, of course, is the Establishment Clause. This is so because historically "one of the specific evils feared by" the Founders "was that the taxing and spending power would be used to favor one religion over another or to support religion in general." *Id.* at 103. The Founders' concern was that "religious liberty ultimately would be the victim if government could employ its taxing and spending powers to aid one religion over another or to aid religion in general." *Id.* at 103-04. Thus, the Court held that a federal taxpayer had standing to assert that a congressional act exceeded Congress's powers to tax and spend because the act violated the Establishment Clause. *Id.* at 105-06. This narrow exception to the general rule denying taxpayer standing was intended solely to address the historical concerns of the Framers.

For this reason, the Court has rejected federal-taxpayer standing in cases raising other theoretical limits on the spending power. *See United States v. Richardson*, 418 U.S. 166, 174-75 (1974) (holding that taxpayer did not have standing to challenge statutes regulating the CIA's accounting process because taxpayer did not allege any specific constitutional limitation on Congress's taxing and spending power). And, more critical for this case, the historical rationale for taxpayer standing also implies limits on the type of government action—congressional spending—that taxpayers may target. *See Valley Forge Christian Coll. v. Americans United for Separation of Church & State, Inc.*, 454 U.S. 464, 480 (1982) (holding that because the Framers were concerned about use of the spending power, taxpayer standing did not extend to challenging an executive decision to transfer a parcel of federal property); *see also Schlesinger v. Reservists Comm.*

*to Stop the War*, 418 U.S. 208, 227-28 (1974) (holding that taxpayers did not have standing to challenge executive-branch action allowing members of Congress to maintain reserve status in the military).

2. Meanwhile, with respect to state-taxpayer standing, *Doremus v. Bd. of Educ. of Borough of Hawthorne*, 342 U.S. 429 (1952), set the same course as *Frothingham*. "[W]e reiterate what the Court said of a federal statute as equally true when a state Act is assailed: 'The party who invokes the power must be able to show, not only that the statute is invalid, but that he has sustained or is immediately in danger of sustaining some direct injury as a result of its enforcement, and not merely that he suffers in some indefinite way in common with people generally.'" *Id.* at 434 (quoting *Frothingham*, 262 U.S. at 488). The Court stressed that a taxpayer case could satisfy Article III "only when it is a good-faith pocketbook action." *Id.*

No Establishment Clause case from this Court since *Doremus* has fully addressed state-taxpayer standing,[1] but *Flast* expressly declared its taxpayer/spending nexus test to be "consistent with the limitation imposed upon state-taxpayer standing in federal courts in *Doremus* . . . ." *Flast*, 392 U.S. at 102-03. *Flast* thus fully embraced the understanding that state taxpayers have the same limited ability as federal taxpayers to raise Establishment Clause challenges.

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[1] *But see Sch. Dist. of the City of Grand Rapids v. Ball*, 473 U.S. 373, 380 n.5 (1985) (collecting cases and summarily affirming state-taxpayer standing notwithstanding *Flast* based on "the numerous cases in which we have adjudicated Establishment Clause challenges by state taxpayers to programs for aiding nonpublic schools"), *overruled on other grounds*, *Agostini v. Felton*, 521 U.S. 203 (1997).

Consistent with this understanding, some lower courts expressly apply *Flast* to state-taxpayer-standing claims. The Eighth Circuit has commented that, because *Everson v. Bd. of Educ. of Ewing Twp.*, 330 U.S. 1 (1947), "indicated that the establishment clause limits state spending powers as well . . . the effect of *Flast* was to harmonize in some respects federal and state taxpayer standing" after *Doremus*. *Minn. Fed'n of Teachers v. Randall*, 891 F.2d 1354, 1357 (8th Cir. 1989) (citing *Everson*, 330 U.S. at 16); *see also Women's Emergency Network v. Bush*, 323 F.3d 937, 943 (11th Cir. 2003); *DeStefano v. Emergency Hous. Group, Inc.*, 247 F.3d 397, 405 (2d Cir. 2001); *Korioth v. Briscoe*, 523 F.2d 1271, 1276-77 & n.16 (5th Cir. 1975) (all applying *Flast* to state- or local-taxpayer-standing claims). Some circuits have even inferred that the requirement in *Doremus* of a "good-faith pocketbook action," 342 U.S. at 434, simply parallels the general Article III direct-injury requirement. *See Taub v. Kentucky*, 842 F.2d 912, 917 (6th Cir. 1988); *Korioth*, 523 F.2d at 1277 n.16. These cases confirm that state-taxpayer suits are governed by the same standard as federal-taxpayer suits.

3. Last term's decision in *DaimlerChrysler Corp. v. Cuno*, __ U.S. __, 126 S. Ct. 1854 (2006), resolved any lingering doctrinal differences between state- and federal-taxpayer standing. There, the Court barred state taxpayers from suing to enjoin tax-credit incentives—which were designed to lure foreign businesses to the state—as violative of the Commerce Clause. *See id.* at 1859. The Court rejected the theory that taxpayers are directly injured because tax credits deplete the general fisc and impose greater burdens on them. *See id.* at 1862-63.

In reaching this decision, the Court relied on cases that have "denied *federal* taxpayers standing under Article III to object to a particular expenditure of federal funds simply because they are taxpayers." *Id.* at 1862. Indeed, the "rationale for rejecting federal taxpayer standing applies with

undiminished force to state taxpayers," and state taxpayers have no argument "different from similar claims by federal taxpayers we have already rejected under Article III as insufficient to establish standing." *Id.* at 1863; *see also ASARCO Inc. v. Kadish*, 490 U.S. 605, 613 (1989) (plurality opinion) (stating that the Court has "likened state taxpayers to federal taxpayers" for purposes of standing and denied Article III standing where taxpayers cannot establish the requisite direct injury).

Critically, *DaimlerChrysler* also relied on *Doremus* as authority for the proposition that state taxpayers have no better Article III footing than federal taxpayers. *See DaimlerChrysler*, 126 S.Ct. at 1863. In fact, the Court reaffirmed that *Flast*—not *Doremus*—has created for Establishment Clause cases a limited exception to the Article III direct-injury rule. *See id.* at 1864-65.

The Court has thus made it clear that federal and state taxpayers must satisfy substantially the same standing requirements when suing in federal court. Full exposition of the limits of *Flast*, therefore, is important not only for federal-taxpayer lawsuits, but also for state-taxpayer lawsuits. The *amici* states' related interest in limiting the scope of permissible taxpayer standing to bring such lawsuits further justifies granting review.

4. Because state-taxpayer standing in Establishment Clause cases is subject to the same limits as federal-taxpayer standing, the decision below broadening taxpayer standing implicates not only federal government separation-of-powers concerns, *see* Pet. 27-28, but also vertical federalism concerns. As the Sixth Circuit has observed, "when State taxpayers attack state spending in federal court, another major consideration operates: the integrity of our government's federalist structure." *Taub*, 842 F.2d at 919.

The Court acknowledged essentially this point in *DaimlerChrysler* when it mentioned the affront to state sovereignty that occurs when federal courts stray beyond their ken to sit in judgment of state officials without a genuine Article III basis for review. Lax standards for state-taxpayer lawsuits "would interpose the federal courts as virtually continuing monitors of the wisdom and soundness of state fiscal administration, contrary to the more modest role Article III envisions for federal courts." *DaimlerChrysler*, 126 S.Ct. at 1864.

This concern arises every bit as much in Establishment Clause cases as it does in Commerce Clause or other types of constitutional challenges. By definition, the government function at stake in all taxpayer-standing cases is government spending, and "[a] sovereign must have the authority to determine how tax revenues are to be spent, or the power to tax is illusory." *Taub*, 842 F.2d at 919. This same core sovereign act is at issue in taxpayers' Establishment Clause challenges. That is, whether the basis for a taxpayer's federal-court challenge to state spending arises from the First Amendment or elsewhere, the federalism value of judicial restraint—requiring forbearance absent well-established grounds for exercising jurisdiction—remains the same.

For these reasons, a decision in this case may benefit the states in terms of maintaining proper federal-state comity. If the Court grants review, reverses, and thereby narrows the circumstances when federal-court standing is available, it will have the concomitant effect of alleviating some vertical federalism concerns by reducing the number of taxpayer cases that could be brought against states in federal court.

## II. Taxpayers Frequently Challenge a Wide Variety of State Programs on Establishment Clause Grounds

As things stand, state-taxpayer Establishment Clause challenges arise relatively frequently. According to a recent law-review article, federal district and appellate courts decided at least 50 such claims between 1982 and 2003. *See* Nancy C. Staudt, *Taxpayers in Court: A Systematic Study of a (Misunderstood) Standing Doctrine*, 52 Emory L.J. 771, 819 (2003). Additionally, since 1920, state taxpayers have been plaintiffs in at least 17 Establishment Clause cases that have received plenary review by this Court. *See id.* at 815-16.

State taxpayers bring Establishment Clause challenges against everything from school-voucher and charter-school programs to Boy Scout sponsorships, Good Friday holidays, prison-rehabilitation programs, prayer rooms, legislative prayer, monuments, nativity scenes, student-teacher programs, dual enrollment of public school students in religious schools, and other similar state-government programs.[2]

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[2] *See, e.g.*, *Freedom from Religion Found., Inc. v. Bugher*, 249 F.3d 606, 610 (7th Cir. 2001) (permitting taxpayer challenge to grants to religious schools); *Hinrichs v. Bosma*, 400 F. Supp. 2d 1103, 1114 (S.D. Ind. 2005) (permitting state taxpayers to challenge legislative prayer); *Winkler v. Chicago Sch. Reform Bd. of Trustees*, 2000 WL 44126, at *8 (N.D. Ill. 2000) (allowing Illinois taxpayers to challenge state agency expenditures to sponsor Boy Scouts); *Simmons-Harris v. Zelman*, 72 F. Supp. 2d 834 (N.D. Ohio 1999) (allowing Ohio taxpayers to challenge state's payment of tuition to private schools through voucher program), *rev'd on other grounds*, 536 U.S. 639 (2002); *Porta v. Klagholz*, 19 F. Supp. 2d 290, 295-96 (D.N.J. 1998) (addressing state-taxpayer challenge to statute funding charter schools operating out of church-owned buildings); *Freedom from*

This trend supports the need for review here. Like the decision below, some federal courts have permitted state-taxpayer-standing challenges not only to legislative-spending programs, but also to executive action funded by general legislative appropriations. *See, e.g.*, *Stark v. St. Cloud State Univ.*, 604 F. Supp. 1555, 1557 (D. Minn. 1985) ("Funds for operation of the University program are provided in part

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*Religion Found., Inc. v. Thompson*, 920 F. Supp. 969 (W.D. Wis. 1996) (allowing state taxpayers to challenge Good Friday state holiday); *Scarpino v. Grosshiem*, 852 F. Supp. 798, 801 (S.D. Iowa 1994) (permitting ICLU to represent taxpaying members in challenge to prison-rehabilitation program); *Minn. Fed'n of Teachers v. Nelson*, 740 F. Supp. 694 (D. Minn. 1990) (allowing state-taxpayer challenge to statute allowing public-school students to take coursework at religious post-secondary institutions); *ACLU-Ky. v. Wilkinson*, 701 F. Supp. 1296, 1302-03 (E.D. Ky. 1988) (holding state taxpayers had standing to challenge nativity scene at state capitol); *Cammack v. Waihee*, 673 F. Supp. 1524, 1527 (D. Haw. 1987) (allowing state taxpayers to challenge Good Friday state holiday); *Van Zandt v. Thompson*, 649 F. Supp. 583, 587 (N.D. Ill. 1986), *rev'd on other grounds*, 839 F.2d 1215 (holding taxpayer had standing to challenge prayer room in the capitol building); *Wilder v. Bernstein*, 645 F. Supp. 1292, 1309-11 (S.D.N.Y. 1986) (holding that state taxpayers have standing under *Flast*); *Stark v. St. Cloud State Univ.*, 604 F. Supp. 1555, 1557 n.2 (D. Minn. 1985) (finding state-taxpayer standing to challenge state university's student-teacher program); *Birdine v. Moreland*, 579 F. Supp. 412, 415 (N.D. Ga. 1983) (concluding state taxpayers had standing to challenge proposed monument); *Americans United for Separation of Church & State v. Sch. Dist. of Grand Rapids*, 546 F. Supp. 1071, 1075-76 (W.D. Mich. 1982) (allowing Michigan taxpayers to challenge school district's "shared time" program).

from the State of Minnesota's general operating fund."); *cf. Cammack v. Waihee*, 932 F.2d 765, 771 (9th Cir. 1991) (permitting taxpayer attack on Good Friday state holiday and stating that "[l]egislative enactments are not the only government activity which the taxpayer may have standing to challenge"). A decision in this case, therefore, is not only of theoretical importance to the *amici* states, but also is likely to resolve issues that actually arise in cases brought against state officials.

## CONCLUSION

The petition for a writ of certiorari should be granted.

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